Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

TELKOM S.A. LTD.,

Petitioner,

v.

TELCORDIA TECHNOLOGIES INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred in holding that respondent may relitigate the same non-merits issues that were finally and validly decided in a D.C. Circuit judgment deferring to potentially dispositive proceedings pending in South Africa and therefore dismissing respondent's claims "without prejudice."

2. Whether the court below erred in (i) ruling that an action to confirm a foreign arbitration award justifies a broader exercise of personal jurisdiction over a South African company than would otherwise be permissible under governing Due Process principles and (ii) applying "Third Circuit case law interpreting the Due Process Clause" instead of "D.C. Circuit law" that is consistent with governing Due Process principles established by this Court's decisions.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The parties to the proceeding before this Court are Telkom S.A., Ltd. ("Petitioner" or "Telkom") and Telcordia Technologies, Inc. ("Respondent" or "Telcordia").

Telkom has no parent company. The Public Investment Corporation Limited is the only publicly held company that owns 10% or more of Telkom's stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Aug. 14, 2006) is reported at 458 F.3d 172. (App. 1a-15a.) The Third Circuit reversed an unreported order of the United States District Court for the District of New Jersey (Jan. 24, 2005), which had dismissed with prejudice Telcordia's petition to confirm an arbitration award by reason of the previous adjudication of the same issues in the D.C. Circuit. (App. 16a-17a.) The Third Circuit also reversed the district court's unreported supplemental opinion (Feb. 15, 2005), which had dismissed the confirmation petition for lack of personal jurisdiction. (App. 18a-30a.)

The opinion of the United States District Court for the District of Columbia previously dismissing Telcordia's virtually identical confirmation petition (July 22, 2003) is unreported. (App. 31a-40a.) The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the district court's dismissal (Apr. 9, 2004) is available at 2004 WL 784074. (App. 42a-44a.)

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on August 14, 2006. (App. 1a.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

This case concerns the Due Process Clause of the Fourteenth Amendment, which provides that no "State shall deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

This case also involves the provisions of 9 U.S.C. § 201, *et seq.*, and the Convention on the Recognition and

Enforcement of Foreign Arbitral Awards of June 10, 1958 ("New York Convention"). Both are set out in the Appendix. (App. 45a-47a, 48a-57a.)

STATEMENT OF THE CASE

In an action involving the same claims and the same parties as the case below, the D.C. Circuit previously issued a final judgment dismissing Telcordia's petition to confirm the South African arbitral award at issue here. The D.C. Circuit unanimously ruled that, under Article VI of the New York Convention, it was appropriate to defer to the courts of South Africa, which had annulled the award as inconsistent with South African law and arbitration procedures.

Under the New York Convention, the courts of the arbitral forum (in this case, South Africa) have exclusive jurisdiction to determine the validity of an award and an invalid award cannot be enforced elsewhere.[1] The dismissal of Telcordia's D.C. confirmation petition was without prejudice because Telcordia had appealed the annulment order in South Africa and might bring a new petition to confirm the award if the award were reinstated. (The South African proceedings are still pending.) Because it was dismissing the case, the D.C. Circuit did not review the D.C. district court's ruling that

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[1] "There appears to be no dispute among [the leading] authorities that an action to set aside an international arbitration award is controlled . . . by the domestic law of the rendering state * * * * '[T]he validity of the award . . . was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of the local courts at the seat of arbitration.'" *Yusuf Ahmed Alghanim v. Toys "R" Us*, 126 F.3d 15, 21-22 (2d Cir. 1997) (citations omitted); *see also Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd.*, 191 F.3d 194, 196 (2d Cir. 1999).

there was no personal jurisdiction over Telkom. (App. 43a.)

Telcordia almost immediately filed another petition to confirm the award in the New Jersey district court. After extensive proceedings and a half-day hearing, the court dismissed the petition with prejudice, recognizing that (1) the same issues had been adjudicated by the D.C. Circuit, and (2) there was "no basis to assert personal jurisdiction over Telkom." (App. 16a, 24a.) The New Jersey district court also ruled, in the alternative, that it was appropriate to dismiss without prejudice under Articles V and VI of the New York Convention in deference to the South African appellate proceedings. (App. 17a.)

The Third Circuit reversed the district court's decision to dismiss with prejudice. Without citing any supporting authority, the court of appeals concluded that rulings of sister courts on procedural issues not disposing of the substantive merits of a case are not entitled to preclusive effect. The court therefore refused to consider itself bound by the D.C. Circuit's decision to defer to the South African courts. (App. 11a-13a.) The court also reversed the New Jersey district court's holding (like that of the D.C. district court) that exercise of jurisdiction over Telkom would not comport with traditional notions of fair play and substantial justice. (App. 11a.) The Third Circuit concluded that personal jurisdiction could be exercised over Telkom because relaxed standards should apply to an action to enforce an international arbitration award (App. 10a-11a), and because of the need to apply "Third Circuit law" rather than view issues through "the lens of D.C. Circuit law" (App. 9a).

A. Background

Petitioner Telkom is a South African telecommunications corporation. (App. 18a.) Respondent

Telcordia is a Delaware corporation based in New Jersey. (App. 18a.) Telkom does no business in the United States; it has no agents, officers, property, or bank accounts here; and it holds no investment in any U.S. company. Formerly the state-owned telephone monopoly, Telkom was privatized in 2004 and is an ordinary commercial company.

Telkom buys equipment through public requests for bids ("RFB"), to which interested suppliers respond. (App. 19a.) In October 1998, Telkom issued an RFB in South Africa for telecommunications software to be installed and used in South Africa. (App. 25a.) After Telcordia outbid 18 other companies of various nationalities, Telkom and Telcordia entered into a contract known as the "Integrated Agreement" or "IA." (App. 19a.)

The New Jersey district court (as had the D.C. district court) found that all aspects of negotiation and performance of the Integrated Agreement were based in South Africa:

> "the parties' negotiations occurred [in South Africa]; the IA was signed in Pretoria; Telcordia was required to open an office there from which to perform the contract; the IA was governed by South African law; any disputes were to be arbitrated there; the parties submitted to the jurisdiction of the South African courts; and the vast majority of the parties' dealings took place in South Africa." (App. 25a.)

The district court also found that all the "[k]ey Telcordia personnel relocated to South Africa, all deliveries were made in South Africa, and Telcordia rendered its invoices to Telkom in South Africa." (App. 19a.)

Disputes arose about whether Telcordia's software complied with contractual specifications. (App. 2a.) In

early 2001, both parties cancelled the IA, each claiming breach by the other. (App. 20a.) Arbitration proceedings were convened in Johannesburg, with an English barrister appointed as sole arbitrator. (App. 20a.)

During hearings, Telkom's counsel became concerned that the arbitrator was applying English rather than South African law. (App. 20a.) As authorized by the IA's governing law, Telkom invoked Section 20 of the South African Arbitration Act, which allows referral of legal questions "at any stage" of a South African arbitration to the South African courts. After the arbitrator expressed reluctance to follow this procedure, Telkom applied to the High Court for review of the disputed issues of South African law. The arbitrator later submitted a "Memorandum" to the High Court urging it not to entertain the application. That same day, without waiting for the High Court's decision on Telkom's application, the arbitrator issued an award in favor of Telcordia. (App. 20a.)

B. Proceedings in South Africa and in the D.C. Federal Courts

Telkom moved to set aside the award in the South African courts pursuant to Section 33 of the South Africa Arbitration Act. Under Article V(1)(e) of the New York Convention, the South African courts have authority to set aside the award under local law because they are the "competent authority of the country in which, or under the law of which, that award was made." Telkom argued that the award should be set aside because, among other things, the arbitrator had improperly refused to allow the High Court to rule on the Section 20 application, "not afford[ed] Telkom a fair hearing," refused to convene a promised "further oral hearing" to consider evidence pertinent to the award, and exceeded his powers under South African law. (App. 20a.)

Meanwhile, Telcordia was seeking to enforce the award in the District of Columbia district court pursuant to 9 U.S.C. § 203. That court dismissed its petition. (App. 31a.) It held that the exercise of personal jurisdiction over Telkom "would not comport with 'traditional notions of fair play and substantial justice,'" (App. 37a (*quoting Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))), finding that Telkom "reasonably expected . . . not to be haled into court here . . . because the parties expressly consented to the jurisdiction of the South African courts and agreed that South African law would govern their agreement, and because the contract activities were centered in South Africa" (App. 36a). The district court alternatively dismissed on grounds of *forum non conveniens*. (App. 38a-39a.)

During the pendency of Telcordia's appeal to the D.C. Circuit, the High Court in South Africa set aside the arbitral award on grounds that the arbitrator breached multiple duties under South African law. (App. 20a.) Then, on April 9, 2004, the D.C. Circuit affirmed the D.C. district court's judgment. (App. 42a-44a.) Relying on its power to "affirm a judgment on any ground that [was] properly raised below, even if the district court did not rely on it," the court held that the case should be dismissed pursuant to Article VI of the New York Convention, which had been extensively argued in the D.C. district court proceedings:

> "Article VI . . . allows a district court to 'adjourn' a decision on the enforcement of the arbitral award if 'an application for the setting aside or suspension of the award has been made to a competent authority . . . .' Telkom made such an application to the High Court of South Africa. (On November 27, 2003, after Telcordia filed this appeal, the High Court issued a decision setting aside the partial award, which Telcordia says it intends to appeal.)." (App. 43a.)

The D.C. Circuit dismissed Telcordia's petition "without prejudice," so that Telcordia might refile if the South African courts reinstated the award. (App. 44a.)

C. Proceedings in the New Jersey District Court

Instead of awaiting its hoped-for reinstatement of the award by the South African Supreme Court of Appeal and then refiling in the D.C. district court, Telcordia filed essentially the same confirmation petition in the New Jersey district court several weeks after the D.C. Circuit dismissed its first petition. Invoking the district court's subject matter jurisdiction under 28 U.S.C. § 1331 and 9 U.S.C. § 203, Telcordia contended that because the D.C. Circuit's dismissal was "without prejudice," the decision had "no preclusive effect." (Pet. to Confirm Partial Arbitral Award and Compel Further Arbitration, No. 04-2463, at 18 (D.N.J. May 26, 2004).)

The New Jersey district court dismissed the petition on three grounds. First, it dismissed with prejudice because "principles of issue preclusion or estoppel [did] not permit [Telcordia] to relitigate the judgment of the U.S. Court of Appeals for the District of Columbia Circuit." (App. 17a.) Second, the court (like the D.C. district court) found that there was "no basis to assert personal jurisdiction over Telkom" because "the parties anchored their contractual relationship to South Africa, expressly consented to the jurisdiction of the South African courts, and agreed that South African law would govern their agreement." (App. 24a, 28a-29a.) Third, as an alternative holding, the court "dismissed without prejudice" because, if it were not precluded from reconsidering the issues decided by the D.C. Circuit, it would also dismiss the case pursuant to Article VI of the New York Convention. (App. 17a.)

D. The Decision Below

Reversing the New Jersey district court's "with prejudice" dismissal of Telcordia's petition, the Third Circuit held that Telcordia could relitigate its confirmation petition in New Jersey because the D.C. Circuit's judgment was not a decision "on the merits." (App. 11a-12a.) Reviewing the issue anew, however, the Third Circuit affirmed the New Jersey district court's decision to dismiss "without prejudice" under Article VI of the New York Convention. (App. 14a-15a.)

The Third Circuit also reversed the district court's ruling on personal jurisdiction. Disregarding the undisputed facts that had led two district courts to conclude that it would be unfair and unreasonable to compel Telkom to litigate a South African-based dispute in the United States, the Court observed that a relaxed standard of personal jurisdiction should apply because "the proceeding was for the enforcement of a foreign arbitral award, rather than adjudication on the merits." (App. 9a-11a.) Furthermore, the Court concluded that personal jurisdiction should be determined "through the lens of Third Circuit law" rather than "D.C. Circuit law." (App. 9a.) On this basis, the Court thought that exercise of personal jurisdiction over Telkom was reasonable because Telkom had purchased "customized merchandise" from a New Jersey corporation, had failed to wire a payment to a New Jersey bank, and had sent representatives to New Jersey at Telcordia's urgent suggestion after problems arose in the software. (App. 10a.)

REASONS FOR GRANTING THE WRIT

The court below should have simply affirmed the district court's conclusion that issue preclusion principles prevented Telcordia from relitigating its claims in New Jersey. Instead, it refused to respect the finality of the

D.C. Circuit's judgment and reached out to decide the question of personal jurisdiction in a manner that, to the eyes of South Africans and probably others, suggests an aim to protect the interests of a New Jersey company that the court thought would not be protected adequately in the D.C. Circuit or elsewhere. In deciding the case as it did, the Third Circuit brought itself into conflict with decisions of this Court and other courts of appeal. These actions warrant the exercise of this Court's supervisory power.

First, the Third Circuit's willingness to allow relitigation of the issues decided by the D.C. Circuit squarely conflicts with decisions of this Court and many courts of appeal holding that principles of issue preclusion bar relitigation of procedural rulings that do not dispose of the merits of a case. By allowing Telcordia to prosecute a new confirmation petition in New Jersey despite the D.C. Circuit's ruling that U.S. courts should defer to the South African proceedings, the Third Circuit not only forced Telkom to litigate the case a second time but also stated a rule that allows Telcordia to file new confirmation petitions in district courts throughout the nation in hope of finding one that will confirm the award. The Third Circuit's refusal to respect the finality of the D.C. Circuit's judgment cannot be limited to cases involving confirmation of arbitral awards. It authorizes relitigation of all kinds of dispositions that do not reach the underlying merits of a dispute and invites conflicting decisions by courts in different circuits even in the same cases.

Second, the flaws in the Third Circuit's ruling on personal jurisdiction go well beyond its disregard of the undisputed facts that led two district courts to find that it would be unfair and unreasonable to force Telkom to litigate a South African dispute in the United States. The court applied a principle, which has been rejected by three other courts of appeal, that foreign persons are amenable

to personal jurisdiction in proceedings to enforce arbitral awards under standards that are more relaxed than in cases on the merits. Such an unprecedented rule can only discourage foreign companies from entering into arbitration agreements with U.S. firms, and fails to heed the admonition that courts should take "great care and reserve" in exercising personal jurisdiction over foreign persons. *Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 115-16 (1987). Finally, in its attempt to justify its conclusion that "customized merchandise" sold by a New Jersey-based company and Telkom's failure to wire payments to New Jersey subjected Telkom to personal jurisdiction in the U.S., the Third Circuit stressed the need to apply Third Circuit caselaw, rather than law from the D.C. Circuit or elsewhere. (App. 9a.) This ignores, of course, the uniform constitutional standards of due process that apply throughout the United States. The special Third Circuit standards applied in this case deviate from the principles that personal jurisdiction may be exercised only where a party "purposefully avails itself of the privilege of conducting activities within the forum state," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985), and may not be exercised in circumstances inconsistent with "fair play and substantial justice," *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal citations omitted).

I. REVIEW IS WARRANTED TO CORRECT THE THIRD CIRCUIT'S FAILURE TO RESPECT THE FINALITY OF THE D.C. CIRCUIT'S JUDGMENT, UNDER A STATED RULE THAT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

In stating a general rule that only "a decision on the merits [is] entitled to preclusive import," (App. 12a), the Third Circuit ignored this Court's decisions applying principles of issue preclusion to non-merits dispositions,

departed from the uniform rule applied in other circuits, and invented a sweeping exception that encourages mischievous relitigation of issues and conflicting dispositions of cases among courts in different circuits.

A. The Third Circuit's Holding Conflicts With Decisions Of This Court..

Issue preclusion, sometimes called direct or collateral estoppel, embodies the principle that "an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim." *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998). This "ancient rule" "'has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation.'" *San Remo Hotel, LP v. San Francisco*, 545 U.S. 323, 336-37 (2005) (*quoting Hopkins v. Lee*, 6 Wheat. 109, 114, 5 L.Ed. 218 (1821)). This Court has repeatedly applied issue preclusion broadly enough to achieve its purpose of preventing relitigation of decided issues:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in *every case* where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." *Baldwin v. Iowa State*

Traveling Men's Ass'n, 283 U.S. 522, 525-26 (1931) (emphasis added).

Other decisions state the rule no less emphatically.[2]

The rule applies whether the earlier court's dismissal reached the substantive merits of the case or turned on a procedural ground. In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, for example, this Court applied issue preclusion to a non-merits decision, holding that "[i]t has long been the rule that principles of res judicata apply to jurisdictional determinations — both subject matter and personal." 456 U.S. 694, 702 n.9 (1982) (citations omitted).[3]

Ignoring these principles, the Third Circuit justified its refusal to respect the D.C. Circuit's judgment by applying an overly-narrow definition of issue preclusion. Because the D.C. Circuit's dismissal was "without prejudice" to Telcordia's right to refile if the award was reinstated in South Africa, and because it did

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[2] In *New Hampshire v. Maine*, for example, the Court stated that issue preclusion prevents relitigation of an issue of law or fact "actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim." 532 U.S. 742, 748-49 (2001); *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) ("[i]ssue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided"); *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 48-49 (1897) ("a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies . . . .").

[3] The Court in that case used "res judicata" to refer to issue preclusion. *See Migra*, 465 U.S. at 77 n.1 ("The preclusive effects of former adjudication . . . are referred to collectively by most commentators as the doctrine of 'res judicata.'").

not "constitute a decision on the merits," the Third Circuit ruled that the prior decision was not "entitled to preclusive import." (App. 12a.) But this Court's decisions leave no room for such an exception to issue preclusion. Rather, they establish that the doctrine applies to "every case" where a court has issued a final and valid decision, not just those cases where a court dismisses with prejudice or those cases where a court dismisses by reaching the substantive merits of the underlying claim. *See Baldwin*, 283 U.S. at 526.

B. The Decision Below Conflicts With The Decisions Of Every Other Regional Court Of Appeals.

Not surprisingly, the decision below conflicts with the decisions of every other regional court of appeals. (The Federal Circuit apparently has not addressed the issue.) Each regional court of appeals has recognized that issue preclusion prevents courts from reconsidering decisions of other courts, even where the other court dismissed the case without prejudice or without reaching the merits.

Deutsch v. Flannery, 823 F.2d 1361 (9th Cir. 1987), is representative of the many decisions in conflict with the decision below. In that case, the Southern District of New York dismissed a securities lawsuit without prejudice, holding that the complaint failed to plead fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. The plaintiff then filed, in the Northern District of California, a new complaint with new allegations of fraud for most of the claims, but essentially the same allegations for one of the claims. The Ninth Circuit affirmed the district court's dismissal of the unchanged claim on issue preclusion grounds. *Id.* at 1364-65. Even though the decision of the Southern District of New York did not reach the merits of the

plaintiff's claim and was without prejudice, issue preclusion still applied:

> "The litigation of an issue presented and necessarily decided in a prior action between the same parties is foreclosed by the doctrine of issue preclusion. *It matters not that the prior action resulted in a dismissal without prejudice*, so long as the determination being accorded preclusive effect was essential to the dismissal." *Id.* at 1364 (citations omitted) (emphasis added).

The other regional courts of appeal and commentators all agree that issue preclusion applies to a prior final judgment that was without prejudice or did not decide the merits.[4]

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[4] *See In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973) ("[A dismissal 'without prejudice'] must mean without prejudice as to the substantive cause of action. The dismissal is with prejudice on the issue of the obligation to make a demand on the directors with respect to that substantive complaint."); *Grieve v. Tamerin*, 269 F.3d 149, 154 (2d Cir. 2001) (district court decision concluding that *Younger* abstention was appropriate precluded plaintiff from asserting that *Younger* abstention was inappropriate before another district court); *Goldsmith v. Mayor and City Council of Baltimore*, 987 F.2d 1064, 1069 (4th Cir. 1993) ("a jurisdictional dismissal that does not constitute a judgment on the merits so as to completely bar further transactionally-related claims still operates to bar relitigation of issues actually decided by that former judgment"); *Duffy & McGovern Accommodation Serv. v. QCI Marine Offshore, Inc.*, 448 F.3d 825, 830 (5th Cir. 2006) (holding that a decision on "any issue of fact or law, trivial or non-trivial, is preclusive" if the decided issue was actually litigated and necessary to a final judgment and is identical to and reviewed under the same standard as the present issue); *Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786, 789 (6th Cir. 1977) (holding that issue preclusion applies to jurisdictional dismissals); *Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000) ("A dismissal for lack of jurisdiction precludes relitigation of the

(...continued)

Strikingly, the decision below also conflicts with prior Third Circuit law. *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977), arose after a federal district court in New York had dismissed a complaint on grounds of *forum non conveniens*, holding the appropriate forum was England. Plaintiffs sought to litigate the same claims in Delaware federal district court.

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issue actually decided, namely the jurisdictional issue.") (citation omitted); *Pohlmann v. Bil-Jax, Inc.*, 176 F.3d 1110, 1112 (8th Cir. 1999) ("[A]n *issue* actually decided in a non-merits dismissal is given preclusive effect in subsequent action between the same parties . . . .") (emphasis in original); *Park Lake Resources LLC v. Dept. of Agriculture*, 378 F.3d 1132, 1133 (10th Cir. 2004) (applying issue preclusion to dismissal on ripeness grounds); *United States v. Dean*, 752 F.2d 535, 541 n.14 (11th Cir. 1985) ("One exception to [the] general rule [that a prior decision will have *res judicata* effect only if it was a decision 'on the merits'] is that a prior decision not 'on the merits' will have *res judicata* effect as to issues that were actually decided."); *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1248 (D.C. Cir. 1999) ("[U]nder principles of issue preclusion, even a case dismissed *without* prejudice has preclusive effect on the jurisdictional issue litigated") (emphasis in original).

The Restatement and commentators agree that issue preclusion applies regardless of whether the first decision was on the merits. Restatement (Second) of Judgments § 20 cmt. b (1982) ("The rules of issue preclusion apply to a valid and final personal judgment for the defendant even though the judgment is one which, under this Section, does not bar another action on the same claim [i.e., a judgment that is not 'on the merits'].."); 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4418 (2d ed. Supp. 1981) ("[t]he most common applications of direct estoppel arise from dismissal of a first action on grounds that do not go to the merits of the claim presented and that are not intended to preclude a second action. Preclusion of the issues that led to dismissal *is not defeated* by the fact that for some purposes the judgment is not 'on the merits.'") (emphasis added).

The Delaware district court dismissed on issue preclusion grounds and the Third Circuit affirmed, rejecting the argument that issue preclusion applies only to decisions "on the merits" and not to "matters in abatement which may involve the exercise of discretion." *Id.* at 853. It held that "[a] non-merits judgment following a plea in abatement . . . does create a direct estoppel as to matters which were actually adjudicated." *Id.* The court then quoted from the Restatement of Judgments:

> "Although, where the judgment for the defendant is not on the merits, the plaintiff is not precluded from maintaining a new action on the same cause of action, he is precluded from relitigating the very question which was litigated in the prior action. . . . The matter actually litigated and determined is res judicata between the parties in a subsequent action involving the same matter, whether the subsequent action is based upon the same or a different cause of action." *Id.* (*quoting* Restatement of Judgments § 49 cmt. b (1942)).

The court below attempted to distinguish *Pastewka* in a cryptic footnote: "Unlike here, the plaintiffs in *Pastewka* were precluded from bringing their suit in New York. Here, it is undisputed that Telcordia could rebring the petition in the D.C. District Court once a set of events have [sic] passed." (App. 12a n.8.) The "set of events" referred to is Telcordia's continuing efforts to reinstate the award through its South African appeal. This "set of events" has not "passed" and the Third Circuit does not explain why Telcordia should be allowed in the meantime to relitigate its confirmation petition despite the D.C. Circuit's deferral to the South African courts. Issue

preclusion plainly applies to final judgments, like the D.C. Circuit's in this case, imposing a precondition to suit.[5]

C. The Third Circuit's Apparent Confusion Of Claim Preclusion And Issue Preclusion Results In A Rule With Pernicious Consequences.

Because the Third Circuit cites no authority for its rule that issue preclusion applies only to a decision on the merits, it is difficult to understand its reasoning. It appears, however, that the court may have confused the doctrines of issue preclusion and claim preclusion.

Allen v. McCurry contrasted the two doctrines:

> "Under res judicata [claim preclusion],[6] a final judgment *on the merits* of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel [issue preclusion], once a court has decided an issue of fact or law necessary

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[5] *See* Restatement (Second) of Judgments § 20(2) ("A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted *after* the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law. . . . *The issue of maturity, on the other hand, is properly foreclosed.*") (emphases added); *see also Park Lake*, 378 F.3d at 1134 (holding that plaintiffs "[could] not proceed with their claim" because they "[could] overcome the previous dismissal only by showing satisfaction of the conditions for ripeness set forth in" the original judgment.).

[6] In *Migra*, this Court explained that the *Allen* Court "used the term 'res judicata' in a narrow sense, so as to exclude issue preclusion or collateral estoppel." 464 U.S. at 77 n.1.

> to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." 449 U.S. 90, 94 (1980) (citation omitted) (emphasis added.)

Thus, claim preclusion applies where a court has rendered a "final judgment on the merits," which means that the original decision must have "passe[d] directly on the substance of a particular claim before the court." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-02 (2001) (citation, quotation marks and brackets omitted). Claim preclusion does not apply "[i]f the [former litigation] was dismissed . . . on any ground which did not go to the merits of the action." *Hughes v. United States*, 4 Wall. 232, 237, 18 L.Ed. 303 (1866). Issue preclusion, by contrast, applies to final judgments even if they do not reach the substantive merits of the claim. *See Allen*, 448 U.S. at 94.

Issue preclusion and claim preclusion also differ in their effect. Claim preclusion bars relitigation of "not only . . . matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also . . . any other available matter which might have been presented to that end." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940) (citations and quotation marks omitted). Issue preclusion, however, does not necessarily bar future lawsuits arising out of the claim that was originally dismissed. If the claim can be heard without relitigating an issue already decided, issue preclusion will not prevent a claim from going forward. *See, e.g., Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances*, 723 F.2d 357, 360-61 (3d Cir. 1983).

The Third Circuit's confusion is suggested by its observations that (i) only a "decision on the merits [is] entitled to preclusive import" and (ii) the New Jersey district court's dismissal of the confirmation petition with

prejudice on issue preclusion grounds would preclude Telcordia from ever bringing a future confirmation action even if the award were reinstated. (App. 11a-12a.) While those two points correctly apply to a final judgment on the merits invoking *claim* preclusion, neither is true of *issue* preclusion. Issue preclusion prevents relitigation of the confirmation issues while the South African proceedings seeking to reinstate the award are continuing. Telkom's position below was entirely consistent with this principle.[7]

The Third Circuit's erroneous decision undermines each of the three important objectives of issue preclusion: protection from "the cost and vexation of multiple lawsuits, conser[vation of] judicial resources, and, by preventing inconsistent decisions, encourage[ment] [of] reliance on adjudication." *Allen*, 449 U.S. at 94.

A broad rule allowing relitigation of judgments not disposing of the merits will enable litigants who are unhappy with a dismissal elsewhere to try again in the Third Circuit. The prevailing party will be compelled to litigate the case anew, as Telkom was forced to do. Federal judicial resources will also be consumed in serial relitigation of the same issues.

By allowing such relitigation, the Third Circuit's rule will undermine the conclusiveness of court judgments. Losing parties across the country may seek to refile in a district court of the Third Circuit. At least some of those cases are likely to result in decisions that directly conflict with the earlier decisions. Stated differently, the Third Circuit rule opens a new avenue for collateral

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[7] Telkom acknowledged that "Telcordia may file a new enforcement action in the U.S. if the award is reinstated in the South African appeal." Br. for Resp. in Third Circuit, No. 05-1651, at 20 (3d Cir. June 9, 2005); *see also id.* at 22, 30.

attack on valid and binding judgments from courts in other circuits.

II. REVIEW IS WARRANTED TO CORRECT THE THIRD CIRCUIT'S EXERCISE OF PERSONAL JURISDICTION ON GROUNDS THAT CONFLICT WITH DECISIONS OF THREE OTHER COURTS OF APPEAL AND OF THIS COURT.

The Third Circuit should not have reached the question of personal jurisdiction because it should have dismissed Telcordia's petition as an improper effort to relitigate the D.C. Circuit's judgment. In addressing the issue, moreover, the Third Circuit's decision departed from the holdings of three other courts of appeal, and failed to heed the uniform Due Process standards established by this Court.

The Third Circuit's application of erroneous legal standards results in a sweeping assertion of personal jurisdiction over foreign persons that could discourage business transactions between them and U.S. suppliers, and trigger controversy with other nations over the breadth of jurisdiction claimed by U.S. courts.

A. The Third Circuit's Special Due Process Standard For Arbitral Award Enforcement Cases Conflicts With the Holdings of Three Other Federal Courts of Appeal.

It was undisputed that Telkom is not present in the United States and has no property here. Applying the familiar "minimum contacts" analysis, the two district courts each held that it would be unfair and unreasonable to require Telkom to appear and defend itself in the United States. Lower federal courts have uniformly ruled that, in order to confirm an international arbitral award rendered against a foreign person, a court must have

jurisdiction over that entity's person or its property under circumstances making exercise of jurisdiction reasonable under the Due Process Clauses of the Fifth or Fourteenth Amendments.[8] We are aware of no decision agreeing with the Third Circuit that a special, relaxed standard of minimum contacts should apply to a "proceeding . . . for the enforcement of an arbitral award, rather than adjudication of the merits." (App. 10a.) In so ruling, the Third Circuit departed from the holdings of three other federal courts of appeal that have considered the issue.

Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1120 (9th Cir. 2002), expressly rejected the argument that there are "reduced [personal] jurisdictional requirements over a defendant in suits to confirm [international] arbitral awards." The Ninth Circuit applied the standard of *International Shoe Co.*, 326 U.S. 310, and its progeny, noting that "constitutional due process is satisfied when a non-

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[8] *See Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002); *Base Metal Trading Ltd. v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208 (4th Cir. 2002); *see also Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A.*, 622 F. Supp. 25, 27 (S.D.N.Y. 1985); *Italtrade Int'l USA, LLC v. Sri Lanka Cement Corp.*, No. Civ. A. 00-2458, 2002 WL 59399, at *2 (E.D. La. Jan. 15, 2002); *CME Media Enters. v. Zelezny*, No. 01 Civ. 1733, 2001 WL 1035138, at *3 (S.D.N.Y. Sept. 10, 2001); *cf. Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202, 206-07 (2d Cir. 2003) (acknowledging consensus but remanding for jurisdictional discovery); *accord* Restatement (Third) of Foreign Relations Law of the United States § 487 cmt. c (1987) ("As with respect to judgments . . . , an action to enforce a foreign arbitral award requires jurisdiction over the award debtor or his property."). *But see TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005) (noting in dicta that "although courts often assume the minimum contacts test applies in suits against foreign 'persons,' that assumption appears never to have been challenged").

resident defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Glencore Grain Rotterdam*, 284 F.3d at 1123 (quotation marks and brackets omitted). Because the *International Shoe* standards could not be satisfied as to the defendant, an Indian rice exporter, and none of that exporter's assets had been identified in the forum state, the Ninth Circuit affirmed dismissal of a petition to confirm a foreign arbitral award against the exporter.

Similarly, in *Base Metal Trading Ltd. v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208 (4th Cir. 2002), the Fourth Circuit was asked to confirm an arbitral award rendered in Moscow against a Russian aluminum manufacturer. The court specifically ruled that, in actions to confirm international arbitration awards, "the [New York] Convention . . . does not confer personal jurisdiction when it would not otherwise exist." *Id.* at 212. Applying the standards set forth in *International Shoe* and its progeny and in *Shaffer v. Heitner*, 433 U.S. 186 (1977), the court held that "a general public policy interest in encouraging and enforcing arbitration agreements . . . is not paramount to the interests protected by the Due Process Clause." *Id.* at 215.

And in *Creighton Ltd. v. Qatar*, 181 F.3d 118 (D.C. Cir. 1999), a Cayman Islands corporation based in Tennessee filed suit in Washington, D.C. to confirm an arbitral award entered in Paris against the government of Qatar. In holding that it lacked personal jurisdiction to confirm the award, the D.C. Circuit rejected the argument that Qatar had invited personal jurisdiction in a U.S. confirmation action by entering into an international arbitration agreement with a U.S.-based company. The court observed that "an agreement to . . . arbitrate in a particular jurisdiction is applicable only within that jurisdiction." 181 F.3d at 126 (citation omitted). Applying the standards of *International Shoe*, the D.C. Circuit then

proceeded to reject as a basis for personal jurisdiction the same factors accepted by the Third Circuit in this case, holding that entering into an agreement to arbitrate a dispute with a U.S.-based company in a third country does not reflect any "reasonable anticipation" of being sued in a U.S. action to enforce an arbitral award:

> "Creighton claims that Qatar has the requisite minimum contacts mainly because Qatar entered into a contract with a company based in the United States. Because that contract provided for ICC arbitration of all disputes and (according to Creighton) Qatari law does not recognize or enforce arbitral awards, 'it was certainly foreseeable that Creighton would seek to enforce any award in its favor . . . in the United States.' In addition Creighton asserts that Qatar contacted Creighton in Tennessee during the negotiations leading to the contract in order to clarify an apparent error in Creighton's bid, Creighton signed a modification to the contract in Tennessee, and during construction Qatar telexed weekly status reports to Creighton's offices in Tennessee.
>
> These contacts, however, do not demonstrate that Qatar purposefully availed itself of the laws of the United States and hence should reasonably have anticipated the risk of being haled into court here." 181 F.3d at 127.

The Third Circuit reached the opposite conclusion in this case:

> "[T]he desire to have portability of arbitral awards prevalent in the Convention influences the answer as to whether Telkom 'reasonably anticipate(d) being haled into' a New Jersey court. *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Moreover, the fact that the arbitration at issue was between a New Jersey corporation and

> the former government-owned state telecommunications monopoly illustrates New Jersey's interest in adjudicating this dispute." (App. 10a.)

The Third Circuit, in sum, regarded the "portability of [international] arbitration awards" as a key factor in deciding that Telkom could reasonably be required to defend itself in the United States. Its analysis squarely conflicts with the Ninth, Fourth, and D.C. Circuit holdings that actions to enforce international arbitration awards against foreign persons do not warrant any relaxation of the "minimum contacts" standard on which personal jurisdiction depends. Furthermore, as we show in the next section, the Third Circuit's analysis of "minimum contacts" was seriously flawed in other respects.

The conflict between the Third Circuit's ruling and the decisions of the three other circuits frames an important issue. Foreign businesses such as Telkom will be understandably reluctant to enter into contracts with U.S.-based suppliers if they face the risk of having to defend themselves in the U.S. even though their contract calls for performance and arbitration outside the U.S. under a different nation's laws. In departing from the holdings of three other federal courts of appeal, the Third Circuit failed to engage in the careful analysis mandated by *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), that "great care and reserve" must be exercised before requiring a non-resident foreign person to defend itself in the United States. Although this Court was evenly split over whether Asahi Metal had the "minimum contacts" with California required to satisfy due process, eight justices agreed that the exercise of personal jurisdiction over Asahi Metal "would offend traditional notions of fair play and substantial justice":

> "The unique burdens placed upon one who must defend oneself in a foreign legal system should

have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 115.

The potential impact of the Third Circuit's ruling on the willingness of foreign persons to contract and arbitrate disputes with U.S. suppliers, and related issues of fairness, should be weighed in light of the fact that arbitration clauses are now the rule rather than the exception in international commercial contracts. *See* Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 Am. J. Comp. L. 233, 233 n.1 (Fall 2006) (estimating that 90% of international contracts contain an arbitration clause). The number of international arbitrations has also increased sharply in recent years.[9] The Third Circuit's decision creates uncertainty over whether foreign buyers who agree to arbitrate disputes with U.S. suppliers thereby subject themselves to broadened assertions of personal jurisdiction by U.S. courts.

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[9] Drahozal observes that "between 1993 and 2003, the number of international arbitration proceedings administered by leading institutions almost doubled." *Id.* at 233. The American Arbitration Association's international arbitration caseload "more than tripled," during that time. The International Chamber of Commerce has also seen participation by U.S. parties (as both claimants and respondents) increase drastically in the past two-and-a-half decades. *Id.* In every year between 1998 and 2004, more U.S. entities participated in ICC arbitrations than entities of any other nationality, and U.S. persons now constitute approximately 12% of all parties to ICC arbitrations. *Id.* at 244.

B. Review Is Warranted To Correct The Erroneous "Third Circuit Case Law" Standard For Determining Personal Jurisdiction Issues.

The Third Circuit also disregarded the principles of *Asahi Metal* and other decisions of this Court when it rejected the conclusions of the two district courts that it would be unfair and unreasonable to exercise personal jurisdiction over Telkom. The Third Circuit explained that the district courts had erroneously viewed personal jurisdiction issues "through the lens of D.C. Circuit law" rather than "through the lens of Third Circuit law." (App. 9a.) This rationale ignores, of course, that D.C. Circuit and Third Circuit standards should not differ because "[t]here is, after all, only one Due Process Clause in the Fourteenth Amendment." *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

It is the Third Circuit standard, not the D.C. Circuit standard, that plainly departs from the principles stated in this Court's personal jurisdiction decisions. The facts found by both district courts established that all material aspects of the negotiation and performance of the Integrated Agreement took place in South Africa. Telkom issued its RFB in South Africa; all negotiations occurred there; the IA was signed there; Telkom opened an office there from which it was required under the IA to perform the contract; South African law governed; arbitration was to be held there; the parties agreed to the jurisdiction of the South African courts; the key Telcordia personnel relocated to South Africa; all deliveries were made there; and Telcordia rendered its invoices there. (App. 19a, 25a; App. 32a, 36a-37a.)

Under these undisputed facts, both district courts concluded that there was no basis for finding that Telkom "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the

benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). (App. 24a; App. 35a-38a.) In addition, each court concluded that it would not "comport with fair play and substantial justice" to require Telkom to defend itself in the U.S. even if Telkom could be deemed to have contacts with the United States. *Id.* at 476 (citation and quotation marks omitted). (App. 28a; App. 37a).

Sweeping aside the undisputed factual findings, the court below held that special Third Circuit standard warranted the exercise of personal jurisdiction because Telkom (a) had purchased "customized merchandise" from a New Jersey company, (b) had sent its employees to New Jersey — at Telcordia's request — to address urgent software problems, and (c) did not wire money to Telcordia's New Jersey bank after disputes arose. Following this Court's decisions, each of the district courts regarded these same supposed "contacts" with New Jersey as incidental reflections of Telcordia's choice of New Jersey as a headquarters, and not as any act of "purposeful availment" by Telkom of the privileges and protections of New Jersey law. (App. 26a-27a; App. 36a-37a.)

In rejecting what it called D.C. Circuit law, the Third Circuit plainly intended to apply a due process standard quite different from that applied in the otherwise strikingly similar *Creighton* case. The D.C. Circuit held that Qatar's incidental contacts with the United States arising out of a contract negotiated and performed in Qatar (and arbitrated in Paris) could not reasonably be a basis for finding "purposeful availment" and for exercising personal jurisdiction over the foreign buyer. As the D.C. Circuit explained, a "purchaser who selects an out-of-state seller's goods or services based on their economic merit does not thereby purposefully avail itself of the seller's state law, and does not merely by purchasing from the seller submit to the laws of the

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-1653

TELCORDIA TECH INC., IN THE MATTER OF THE ARBITRATION OF CERTAIN CONTROVERSIES BETWEEN,

Appellant,

v.

TELKOM SA LTD.

Filed: August 14, 2006

Before SCIRICA*, FUENTES and ROTH**, Circuit Judges.

OPINION OF THE COURT

ROTH, Circuit Judge:

We review here two orders by the District Court of New Jersey. In the first, the District Court granted Telkom SA Ltd.'s motion to dismiss Telcordia Technologies Inc.'s petition to confirm a partial arbitral award. Specifically, the District Court dismissed

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*This case was argued before the panel of Judges Fuentes, Roth and Rosenn. As Judge Rosenn passed away on February 7, 2006, Judge Scirica has been added to the coram.

**Judge Roth assumed senior status on May 31, 2006.

Telcordia's petition with prejudice because of issue preclusion or estoppel resulting from a previous decision by the D.C. Circuit Court of Appeals dismissing a similar petition by Telcordia without prejudice. In the alternative, but still in the first order, the District Court dismissed the petition without prejudice because the court chose to exercise "its discretion not to enforce the award at this time."

In the second order, the District Court dismissed the petition for lack of personal jurisdiction over Telkom and denied Telcordia's request for jurisdictional discovery. For the reasons that follow, we find that the District Court does have personal jurisdiction over Telkom. Furthermore, we find that considerations of comity and the proper interpretation of the New York Convention dictate that the petition be dismissed without prejudice.

I. Background

Telcordia, with a principal place of business in Piscataway, New Jersey, entered into a multimillion dollar contract with Telkom, a South African telecommunications company that was formerly the state-owned telephone monopoly.[1] Pursuant to the agreement, Telkom was to pay Telcordia more than $249 million for customized telecommunications software. Unfortunately, the performance of the contract was racked with disputes, mainly with respect to whether the software complied with certain contractual specifications.[2]

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[1] Telkom was privatized in 2004 and currently operates as an ordinary commercial company under South African law with the government as a shareholder.

[2] For reasons that will become clear, the substance of the underlying contractual dispute is not particularly important for purposes of this appeal. As such, the underlying dispute will be referred to only in passing.

Pursuant to the parties' contract, the two companies entered into binding arbitration in South Africa according to the rules of the International Chamber of Commerce (ICC). The arbitrator was Anthony Boswood, QC, of Fountain Court Temple, London, England. During the proceedings, Telkom sought intervention from the South African High Court to correct alleged errors in the arbitration.[3] Specifically, Telkom concluded that the arbitrator was viewing issues from the perspective of English law, instead of South African law, as required by the parties' agreement. Before the High Court could act, on September 27, 2002, the arbitrator held that Telkom was liable to Telcordia for breach of contract. On September 30, 2002, the ICC's International Court of Arbitration formally issued its final award in favor of Telcordia and directed the parties to give it effect.

Shortly thereafter, Telcordia petitioned the United States District Court for the District of Columbia to confirm the arbitral award pursuant to the New York Convention.[4] Contemporaneously, Telkom had filed a

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[3] The South African High Court is a trial court.

[4] At the time Telcordia brought the petition, the Government of South Africa was the majority owner of Telkom. Consequently, venue is permitted in, but not limited to, the District of Columbia pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1391(f), which states that:

> A civil action against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] may be brought-
>
> (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;
>
> (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title [28 USCS § 1605(b)];

(...continued)

separate action in the South African High Court to have the award set aside or annulled pursuant to Section 33 of the South African Arbitration Act. Article III of the New York Convention provides that each state party "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." The setting aside or annulment of the arbitral award by the South African Court would be grounds for other courts to refuse recognition and enforcement of the arbitral award pursuant to Article V of the New York Convention. Specifically, Article V(1)(e) provides that:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (e) The award has not yet become binding on the parties, or has been set aside or
>
> suspended by a competent authority of the country in which, or under the law of which, that award was made.

In July 2003, the D.C. District Court dismissed the case without prejudice on the grounds that it lacked

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(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title [28 USCS § 1603(b)]; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(brackets in original)

personal jurisdiction over Telkom and, alternatively, that the case could not proceed under the doctrine of *forum non conveniens*. Telcordia appealed to the U.S. Court of Appeals for the D.C. Circuit. That court affirmed on the alternative ground that under Article VI of the New York Convention the District Court should have adjourned its proceeding and awaited the outcome of the pending action in South Africa.[5] Article VI provides a mechanism by which courts asked to enforce an arbitral award can adjourn to await the type of proceeding in the situs jurisdiction referenced in Article (V)(1)(e). Accordingly, the D.C. Circuit dismissed the petition without prejudice.

On November 27, 2003, and while the case was on appeal in the D.C. Circuit, the South African High Court issued a decision setting aside the award and ordering a new arbitration. On November 29, 2004, the Supreme Court of Appeal of South Africa agreed to hear Telcordia's appeal from the trial court's annulment of the award. This appeal is currently pending.

Undeterred, Telcordia brought a petition to enforce the arbitral award in the District of New Jersey. The District Court dismissed the petition with prejudice based on estoppel vis-à-vis the D.C. Circuit decision and, alternatively and cryptically, dismissed without prejudice pursuant to the New York Convention. In a second order, the District Court dismissed for lack of personal jurisdiction over Telkom. Telcordia timely appealed both orders to this Court.

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[5] Both the United States and South Africa are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is also know as the New York Convention.

II. Subject Matter Jurisdiction and Standard of Review

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Telcordia sought confirmation of an arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), 9 U.S.C. § § 203, *et seq.* This Court has appellate jurisdiction over the two final orders under 28 U.S.C. § 1291.

We review a district court's decision that it possesses or lacks personal jurisdiction *de novo. Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir.2002). In reviewing a motion to dismiss for lack of personal jurisdiction, this Court "must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff." *Id.* (quoting *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 142 n. 1 (3d Cir.1992)). Factual findings made by a district court in determining personal jurisdiction, however, are reviewed for clear error. *Pennzoil Prod. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 200 (3d Cir.1998). Review of a district court's dismissal on grounds of issue preclusion is plenary. *Del. River Port Auth. v. Fraternal Order of Police*, 290 F.3d 567, 572 n. 6 (3d Cir. 2002) (marshaling authority).

The standard of review of a district court's decision to defer to foreign annulment proceedings under Article VI of the New York Convention is one of first impression for this Circuit. We agree with the Second Circuit that "in light of the permissive language of Article VI of the Convention and a district court's general discretion in managing its own caseload and suspense docket, ... the proper standard for reviewing a district court's decision whether to adjourn is for abuse of discretion." *Europcar Italia S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 316-17 (2d Cir. 1998) (internal citations omitted).

III. Discussion

A. PERSONAL JURISDICTION

The District Court of New Jersey may assert personal jurisdiction over Telkom to the extent provided under New Jersey law. *See Carteret,* 954 F.2d at 144 (quoting *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n,* 819 F.2d 434, 436 (3d Cir. 1987)). New Jersey's long-arm statute provides for jurisdiction up to the limits of the protection afforded to nonresidents by the Due Process Clause of the Fourteenth Amendment. *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.,* 102 N.J. 460, 508 A.2d 1127, 1131 (1986). Pursuant to the Due Process Clause of the Fourteenth Amendment, *in personam* jurisdiction may be asserted over a nonresident so long as the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quotation omitted).

The concept of minimum contacts varies according to the nature of the interactions and type of jurisdiction asserted. Specific jurisdiction[6]is established when a nonresident defendant has "purposefully directed" his activities at a resident of the forum and the injury arises from, or is related to, those activities. *General Elec. Comp. v. Deutz AG,* 270 F.3d 144, 150 (3d Cir. 2001). In determining jurisdiction for a breach of contract, the district court must consider the totality of the

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[6] Since we find that the District Court can exercise specific jurisdiction over Telkom relating to the contract at issue, we need not reach the issue of general jurisdiction.

circumstances. *Remick v. Manfredy,* 238 F.3d 248, 256 (3d Cir. 2001).

Traveling to the forum to consult with the other party can constitute purposeful availment, regardless of who solicited the contact. *Carteret,* 954 F.2d at 150. Moreover, physical presence in the forum is no longer determinative in light of modern commercial business arrangements; rather, mail and wire communications can constitute purposeful contacts when sent into the forum. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Also, where a long-term relationship has been established, actual territorial presence becomes less determinative. *General Elec.,* 270 F.3d at 151. Finally, "[i]n contract cases, courts should inquire whether the defendant's contacts with the forum were instrumental in either the formation of the contract *or its breach.*" *Id.* at 150 (emphasis added).Telcordia alleges that Telkom has the following contacts with New Jersey:

> (1) Telkom entered into a long-term, quarter-billion dollar contract with a New Jersey company;
>
> (2) significant activities related to the contract were performed in New Jersey;
>
> (3) Telkom visited New Jersey on numerous occasions in connection with the contract;
>
> (4) Telkom communicated with Telcordia's New Jersey office extensively;
>
> (5) Telkom paid Telcordia via a New Jersey bank
>
> (6) Telkom breached the contract by failing to make payments to said New Jersey bank.

The District Court rejected these proffered contacts on the grounds that they constituted "isolated visits to New Jersey [that] were merely incidental to the performance of the contract and, in any event, were not

occasioned by Telkom's purposeful availment of the privileges of conducting activities in the United States." Also, the District Court relied heavily on the findings of the D.C. District Court, although it did recognize that the findings were not preclusive in light of the D.C. Circuit Court of Appeals's limited holding.

In this regard, the District Court was in error.[7] The D.C. District Court's analysis, which applied D.C. Circuit law, is not determinative in light of Third Circuit case law interpreting the Due Process Clause. Moreover, Telcordia offered additional facts in its current petition linking Telkom to New Jersey that were not analyzed by the D.C. District Court. Finally, the D.C. District Court's analysis did not examine the specific contacts between Telkom and New Jersey viewed through the lens of Third Circuit law; rather, the Court focused broadly on the contacts between Telkom and the United States viewed through the lens of D.C. Circuit law. As such, the persuasive influence of the D.C. District Court's analysis is limited.

In regard to Telkom's contacts with New Jersey, it is undisputed that Telkom and Telcordia entered into a relationship to exchange customized merchandise. Put another way, their contract did not constitute the isolated interaction of a supplier putting an item into the stream of commerce to be fished out by a consumer. As such, Telkom's lack of a physical presence in New Jersey becomes less determinative. *General Elec.*, 270 F.3d at 151.

It is also undisputed that Telkom representatives traveled into New Jersey pursuant to the business

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[7] The District Court's determinations did not contain factual findings; rather, the determination focused on the legal import of undisputed events and facts. As such, they are reviewed *de novo*. *Pinker*, 292 F.3d at 368.

relationship. For example, representatives visited New Jersey to participate in testing-related matters once problems arose in the contract. Such consultations, when they constitute a significant part of the business relationship, represent purposeful availment. *See Carteret,* 954 F.2d at 150. Given the specific nature of the requested goods, the close relationship and resulting consultations were a significant part of the business arrangement. Moreover, the breach of contract, *i.e.*, the failure to pay for contractually compliant software, occurred when the payment was not placed in a New Jersey bank pursuant to the parties' course of dealings. Also, the fact that the contract called for the establishment of an office in South Afri is not determinative. *Strick Corp. v. A.J.F. Warehouse Distribs., Inc.,* 532 F.Supp. 951, 960 (E.D.Pa. 1982) (noting that "[i]t is not necessary that a suit be brought where the defendant has the most contacts or even in the most logical forum.").

Finally, the fact that the proceeding was for the enforcement of an arbitral award, rather than adjudication on the merits, rightly colors our analysis. Although the New York Convention does not diminish the Due Process constraints in asserting jurisdiction over a nonresident alien, the desire to have portability of arbitral awards prevalent in the Convention influences the answer as to whether Telkom "reasonably anticipate(d) being haled into" a New Jersey court. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Moreover, the fact that the arbitration at issue was between a New Jersey corporation and the former government-owned state telecommunications monopoly illustrates New Jersey's interest in adjudicating this dispute. *Id.* at 292 (noting that "[i]mplicit in this emphasis on reasonableness [of assuming jurisdiction] is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other

relevant factors, including the forum State's interest in adjudicating the dispute"). Thus, the totality of the circumstances points toward sufficient contacts by Telkom with New Jersey. As such, the District Court has jurisdiction to enforce the arbitral award.

B. ISSUE PRECLUSION

In its order dated January 24, 2005, the District Court dismissed with prejudice Telcordia's petition based on the D.C. Circuit's decision. Specifically, the District Court held that:

> Telcordia's Petition is dismissed with prejudice because principles of issue preclusion or estoppel do not permit it to relitigate the judgment of the U.S. Court of Appeals for the District of Columbia Circuit in *Telcordia Technologies, Inc. v. Telkom SA, Limited* (No. 03-7099, issued on April 9, 2004), which upheld the dismissal of Telcordia's petition to confirm the same arbitration award pursuant to Article VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*see* 9 U.S.C. §§ 201, *et seq.*) (the "Convention"). In so ruling, this Court does not reach the merits of the parties' underlying dispute.

The D.C. Circuit's decision, however, was that the proceeding should be adjourned pursuant to Article VI of the New York Convention. More concretely, the D.C. Circuit affirmed the District Court's dismissal of the petition without prejudice.

For Telkom to be able to piggyback a dismissal without prejudice into a dismissal with prejudice is anathema to the "wait-and-see" raison d'être of Article VI. Although we agree with Telkom that the decision is still pending in South Africa, given the fact that the case is currently working its way through South Africa's appeals process, the fact that Telcordia prematurely brought a

case for enforcement in New Jersey should not predetermine its ability to ever bring a case in New Jersey, as would be the case if the dismissal was on the merits.[8]

Put another way, this case would be very different if, for example, the D.C. Circuit had ruled pursuant to Article V and refused to enforce the award. Such a decision would likely constitute a decision on the merits entitled to preclusive import. That is not the case here. The D.C. Circuit opinion relied on Article VI rather than Article V.

Telkom's allegations of forum-shopping by Telcordia do not change the analysis. First, the D.C. Circuit did not mention a desire to maintain any type of control over the proceeding, as would be the case if it decided to "adjourn" by issuing a stay-a possibility under Article VI that was recognized by the D.C. Circuit yet not exercised. *Telcordia Technologies, Inc. v. Telkom SA, Limited* (No. 03-7099, issued on April 9, 2004) (noting that "we construe 'adjourn' to mean stay or dismiss without prejudice, we affirm the district court on the ground that the court's dismissal was proper under Article VI"). As such, the filing of the petition in New Jersey does not take

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[8] This Court's decision in *Pastewka v. Texaco Inc.*, 565 F.2d 851 (3d Cir.1977), which Telkom argues is controlling, is inapposite to the instant case. In *Pastewka,* the District Court for the Southern District of New York had dismissed plaintiffs' suits on *forum non conveniens* grounds in favor of adjudication in England. When the plaintiffs tried to bring the same suits in Delaware and were unable to point to any "objective fact establishing that, unlike New York, Delaware would be a more convenient forum than England" this Court dismissed the complaints. Unlike here, the plaintiffs in *Pastewka,* were precluded from bringing their suit in New York. Here, it is undisputed that Telcordia could rebring the petition in the D.C. District Court once a set of events have passed.

the case out of the control of another court and, therefore, does not constitute a type of forum-shopping that would justify remediation by this Court.

Second, to prohibit Telcordia from bringing a claim based solely on allegations of forum-shopping ignores the maxim that courts generally defer to a plaintiff's choice of forum. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995). As such, the District Court's dismissal with prejudice is reversed.

C. ARTICLE VI OF THE NEW YORK CONVENTION

As previously mentioned, the District Court dismissed the petition without prejudice, as an alternative holding, because the Court chose to exercise "its discretion not to enforce the award at this time." In reaching this decision, the District Court found that;

> The High Court issued a decision setting aside the partial award, and Telcordia has persuaded the Supreme Court of appeals of South Africa to review that decision. Literally under article 6 the decision has been set aside, the decision of the arbitrator has been set aside by the High Court of South Africa which is, I find, a competent authority of the country in which or under the law of which that award was made. I don't think there is any dispute about that.
>
> Until the Supreme Court of Appeal rules, the decision of the arbitrator remains set aside, and therefore, both under article 6 which I have just referred to, and article 5(1)(e) the Court would have the authority to refuse to recognize or enforce an arbitral award. Or article 5 and article 6 work together in this respect, it seems to me to commonly, under article 6, give the Court discretion to refuse to enforce at this time, but under article 5 suggest that at this time the

> grounds for refusing to recognize or enforce an arbitral award exist which in turn suggests that at the very least, discretion should be exercised not to enforce it at this time.

We feel that the District Court need not have reached the contours of Article V or the interplay between Articles V and VI. Specifically, the District Court need not have reached its ability to refuse or delay the enforcement of an annulled arbitral award under Article V. As such, we interpret the District Court's order as one for adjournment pursuant to Article VI of the New York Convention. Article VI states that;

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

As was the case when Telcordia sought enforcement in the D.C. Circuit, the annulment proceeding is still pending in South Africa–the South African Supreme Court has agreed to hear the case. Although the arbitral award may have been "literally" set aside by the High Court, the fact that an appeal is currently outstanding before the South African Supreme Court means that functionally an application for setting aside the award is still pending. As such, the District Court's invocation of Article V(1)(e) is premature.

We note further that the District Court's ultimate decision, dismissal without prejudice, is consistent with this Court's notions of comity in the international arena, *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prod. N.V.*, 310 F.3d 118, 126 (3d Cir. 2002), and is the

best way for this Court to give full faith and credit to the decision of the D.C. Circuit Court of Appeals. Consequently, we see no reason to determine the complex interplay between Articles VI and V nor, for that matter, do we choose to disturb the discretionary determination by the District Court.[9]

IV. Conclusion

For the reasons discussed above, the District Court has personal jurisdiction over Telkom. Accordingly, the District Court's order of February 15, 2005, is reversed. As to the judgment entered January 24, 2005, the District Court's decision to dismiss Telcordia's petition without prejudice is affirmed, the decision to dismiss the petition with prejudice, however, is reversed. In the interest of clarity, we note that Telcordia can re-file when the Supreme Court of Appeal of South Africa has issued a judgment in the case. We do not, however, reach the issue of whether we can entertain a new petition pursuant to the New York Convention only if the arbitral award is reinstated by the South African Supreme Court.

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[9] Telcordia argues that the New York Convention allows a court to confirm an arbitral award even if the award has been set aside in the situs country. *See, e.g., Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F.Supp. 907 (D.D.C.1996) (enforcing an arbitral award that had been nullified by a court in the situs country); Article V ("Recognition and enforcement of the award may be refused ...") (emphasis added). Again, we see no reason to reach this question in light of the pending action in South Africa.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Civil Action 04-2463 (JCL)

In the matter of the Arbitration of Certain Controversies
Between TELCORDIA TECHNOLOGIES, INC.,
PETITIONER

v.

TELKOM SA, LIMITED,
RESPONDENT.

[Filed: Jan. 31, 2005]

ORDER GRANTING MOTION TO DISMISS THE PETITION TO CONFIRM PARTIAL ARBITRAL AWARD

THIS MATTER having come before the Court on the motion of Respondent Telkom SA, Limited ("Telkom"), pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss petitioner Telcordia Technologies, Inc.'s ("Telcordia") Petition to Confirm Partial Arbitration Award;

The Court having considered the written submissions of the parties, heard oral argument, and having stated the basis of its rulings in open court on December 9, 2004;

IT 15 ON THIS 24th day of January 2005, ORDERED:

1. Telcordia's Petition is dismissed with prejudice because principles of issue preclusion or estoppel do not permit it to Mitigate the judgment of the U.S. Court of Appeals for the District of Columbia Circuit in *Telcordia Technologies, Inc. v. Telkom SR, Limited* (No. 037099, issued on April 9, 2004), which upheld the dismissal of Telcordia's petition to confirm the same arbitration award pursuant to Article VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards *(see* 9 U.S.C. §§ 201, *et seq.)* (the 'Convention'). In so ruling, this Court does not reach the merits of the parties' underlying dispute.

2. In the alternative, and independent of the judgment of the D.C. Circuit, Telcordia's petition is dismissed without prejudice. As a matter of construction of the Convention, and the facts which exist at this time, the Court is exercising its discretion not to enforce the award at this time.

3. The Court reserves its decision on the issue of personal jurisdiction over Telkom and will supplement this Order with a decision on personal jurisdiction.

/s/ John C. Lifland, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Civil Action 04-2463 (JCL)

In the matter of the Arbitration of Certain Controversies
Between TELCORDIA TECHNOLOGIES, INC.,
PETITIONER

v.

TELKOM SA, LIMITED,
RESPONDENT.

[Filed: Feb. 16, 2005]

MEMORANDUM AND ORDER

LIFLAND, District Judge:

Before the Court is the Motion of Respondent Telkom SA Limited ("Telkom") to Dismiss the Petition of Telcordia Technologies, Inc. ("Telcordia") to Confirm a Partial Arbitration Award rendered in South Africa and Compel Further Arbitration. Telcordia is a Delaware corporation with its principal place of business in Piscataway, New Jersey. Telkom is a South African corporation with its principal place of business in Pretoria, South Africa.

On December 8, 2004, this Court heard oral argument and dismissed Telcordia's Petition based on

preclusion and the New York Convention. Reasons for those alternative dispositions are set forth on the record. The Court also expressed doubt as to whether personal jurisdiction may be asserted over Telkom, but reserved decision on that issue. Telcordia has renewed its request for jurisdictional discovery.

Addressed herein is the issue of personal jurisdiction. For the reasons that follow, the Court concludes that personal jurisdiction may not be asserted over Telkom and that jurisdictional discovery is not warranted.

BACKGROUND

Telkom is a telecommunications company that sometimes buys equipment from suppliers outside of South Africa. It does so through public tenders or requests for bids ("RFB"), to which interested suppliers respond. In June 1999, Telkom and Telcordia entered into a contract ("Integrated Agreement" or "IA") after Telcordia outbid 18 other companies. The RFB was issued in South Africa. The IA, which was negotiated in South Africa and signed at Telkom's offices in Pretoria, required Telcordia to supply telecommunications software for use in South Africa.

The IA was a South African contract in many respects. The IA required Telcordia to open a business office in South Africa from which it was to perform the contract. Virtually all of the parties' dealings occurred there. Key Telcordia personnel relocated to South Africa, all deliveries were made in South Africa, and Telcordia rendered its invoices to Telkom in South Africa. Moreover, South African law governs the IA. All disputes are subject to arbitration in South Africa. Both Telkom and Telcordia consented to jurisdiction of the South African courts.

Disputes arose concerning Telcordia's performance under the IA and both parties canceled the agreement in early 2001. The dispute went to arbitration in Johannesburg; the arbitrator (an English barrister) was appointed by the Arbitration Foundation of South Africa.

Evidentiary hearings took place in May 2002 and continued from July 31 to August 1, 2002. Telkom's counsel reportedly believed that the arbitrator was improperly considering important issues from the perspective of English law instead of South African law. Telkom thus invoked the South African Arbitration Act of 1965, which establishes procedures for referring legal questions of a South African arbitration to the High Court of South Africa (the South African trial court).

The arbitrator urged the High Court not to entertain Telkom's Section 20 application for public policy reasons, and on the same day, issued a partial award deciding breach of contract issues against Telkom (even though they involved legal questions tendered to the High Court). Telkom moved in the High Court to set aside the partial award under Section 33 of the South African Arbitration Act, which is a statutory review procedure providing for the "setting aside of [an] award" under specified circumstances. Telkom contended that the arbitrator had "committed gross irregularities in the conduct of the arbitration proceedings," had "not afford[ed] Telkom a fair hearing," refused to convene a promised "further oral hearing" to consider evidence pertinent to the partial award, improperly refused to allow the High Court to rule on the Section 20 application, made "grossly incorrect" findings that manifestly disregarded the facts and law, ignored relevant evidence, and exceeded his powers under South African law.

On November 27, 2003, the High Court held that the arbitrator had "misconceived the whole nature of the inquiry [presented to him by the parties' dispute] and his

duties in connection therewith," thereby committing "gross irregularities which have prevented a fair trial of the issues." As a result, the High Court set aside the partial award and named new arbitrators. The High Court denied Telcordia's request for leave to appeal to the Supreme Court of Appeal South Africa on May 3, 2004, and Telcordia then petitioned the Supreme Court of Appeal of South Africa.

By letter dated December 1, 2004, Telcordia advised this Court that the Supreme Court of Appeal of South Africa granted it leave to appeal on November 29, 2004. Thus, the matter of the set aside judgment is currently pending before that court.

Ten days after the arbitrator issued his award, Telcordia filed in the United States District Court for the District of Columbia a Petition to Confirm the Arbitral Award. Telkom moved to dismiss the petition on three grounds: (1) lack of personal jurisdiction over Telkom; (2) forum non conveniens; and (3) deference to the pending set-aside proceedings in South Africa under Article VI of the New York Convention, which allows a foreign court asked to enforce the award to adjourn the decision in deference to proceedings in the other jurisdiction's courts concerning the setting aside or suspension of an award. 9 U.S.C. § 201; *see also Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera*, 745 F. Supp. 172, 177-80 (S.D.N.Y. 1990) (discussing reasons why courts asked to enforce foreign arbitral awards routinely grant stays or dismissals under Article VI of New York Convention).

The district court in the District of Columbia dismissed Telcordia's petition. It held that Telkom's contacts with the United States "are insufficient to exercise personal jurisdiction in this case." *In the Matter of the Arbitration of Certain Controversies Between Telcordia Technologies, Inc. and Telkom SA, Limited*, Civ. A. No. 02-1990, at *7 (D.D.C. July 22, 2003). It further held that forum non conveniens warranted dismissal,

noting that "the South African High Court is currently reviewing Telkom's petition to set aside the partial arbitral award that Telcordia seeks to enforce." *Id.* at * 11. Telcordia appealed.

The U.S. Court of Appeals for the D.C. Circuit affirmed on April 9, 2004, stating that it "need not concern [itself] with the application of forum non conveniens ... [or] personal jurisdiction" because "the [district] court's dismissal was proper under Article VI of the New York Convention."[1] *In the Matter of the Arbitration of Certain Controversies Between Telcordia Technologies, Inc. and Telkom SA, Limited,* 03-7099, at *2 (D.C. Cir. Apr. 9, 2004). The court treated the district court's dismissal as without prejudice because the district court did not state otherwise. *Id.*

Telcordia then sought confirmation by this Court of the partial award that was set aside by the South African High Court, whose decision has been granted review by the Supreme Court of Appeal of South Africa.

DISCUSSION

As to personal jurisdiction, Telcordia argues that ample contacts for Telkom exist under either the New

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[1] Article VI of the New York Convention states that "[i]f an application for setting aside or suspension of the award has been made to the competent authority referred to in article V(1)(e), [a court may], if it considers it proper, adjourn the decision on the enforcement of the award. ..." New York Convention, *art. VI*; *see also* 9 U.S.C. § 201. Article V(1)(e) of the New York Convention provides that enforcement of an award "may be refused" if the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention, art. V(1)(e); *see also* 9 U.S.C. § 201.

Jersey long-arm Rule or Federal Rule of Civil Procedure 4(k)(2). Telcordia further maintains that "[i]t is simply not credible for Telkom to claim that it had no expectation of answering to the U.S. courts in a confirmation action, were it to lose at the ICC against a U.S. corporation." (Pet. Opp. at 2).

This Court has already ruled on many of the issues presented and argued by the parties, and has dismissed this action on alternate grounds. What remains unresolved is the issue of personal jurisdiction, to which the Court now turns.

Relevant Law

This Court has jurisdiction over parties to the extent provided under New Jersey state law. Fed. R. Civ. P. 4(e); *see also Carteret Sav. Bank F.A. v. Shushan*, 954 F.2d 141, 144 (3d Cir. 1992). New Jersey's long-arm Rule provides for jurisdiction coextensive with the due process requirements of the United States Constitution. N.J. Court Rule 4:4-4(c); *see also Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 508 A.2d 1127, 1131 (1986). The Due Process Clause of the Fourteenth Amendment guarantees that in *personam* jurisdiction may only be asserted over a nonresident defendant if that defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quotation omitted). Whether personal jurisdiction exists turns on the circumstances of each particular case. *Burger King v. Rudzewicz*, 471 U.S. 462, 485 (1985).

There is personal jurisdiction over a defendant if the defendant has specific or general contacts with the forum. Specific jurisdiction demands that the cause of action be related to or arise out of the defendant's forum-related activities, such that defendant should reasonably

expect to be haled into court there. *Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prod. Co.*, 75 F.3d 147, 151 (3d Cir. 1996); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U. S. 408, 414 n. 8 (1984). In short, the defendant must have "purposefully directed his activities at residents of the forum" and the litigation must have resulted from alleged injuries that "'arise out of or relate[ ] to those activities.'" *BP Chem. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 259 (3d Cir. 2000). General jurisdiction may be asserted if the defendant has "continuous and systematic" contacts with the forum state. *Helicopteros*, 466 U.S. at 414-15.

Alternatively, there may be personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2), which "sanctions personal jurisdiction over foreign defendants for claims arising under federal law when the defendant has sufficient contacts with the nation as a whole to justify imposition of U.S. law but without sufficient contacts to satisfy due process concerns of the long-arm statute of any particular state." Fed. R. Civ. P. 4(k)(2). *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 455 n.7 (3d Cir. 2003).

Analysis

This Court concludes that there is no basis to assert personal jurisdiction over Telkom.

Telcordia points to the following contacts with New Jersey:

> "(1) Telkom entered into a long-term, quarter-billion dollar contract with a New Jersey resident whose principal office is in this state; (2) that contract required Telcordia to perform significant activities in New Jersey; (3) Telkom visited New Jersey on numerous occasions in connection with

> this contract; (4) Telkom communicated with Telcordia's New Jersey office extensively; (5) Telkom paid Telcordia in New Jersey through a New Jersey bank; and (6) Telkom breached the contract by failing to make payments totaling more than 100 million dollars to this New Jersey bank."

(Telcordia Op'n at 32).

Telkom responds that it does not do business in the United States and has no property in this country. It further argues that Telcordia's assertions concerning activities in New Jersey related to their contract are not relevant inasmuch as the IA required Telcordia to perform its contract responsibilities from its office in South Africa and that, in any event, any election by Telcordia to partially perform in New Jersey is not purposeful availment by Telkom. Telkom points out that it is not disputed that it issued its RFB from South Africa for software to be installed and used there; the parties' negotiations occurred there; the IA was signed in Pretoria; Telcordia was required to open an office there from which to perform the contract; the IA was governed by South Africa law; any disputes were to be arbitrated there; the parties submitted to the jurisdiction of the South African courts; and the vast majority of the parties' dealings took place in South Africa.

Telkom also points to the D.C. district court's holding that all aspects of the relationship between the parties were tied to South Africa and thus there was no basis for exercising personal jurisdiction over Telkom. The D.C. district court found that:

> "[T]here are no acts by Telkom of purposeful availment of the privileges of conducting business in the United States, or acts pursuant to which Telkom should

> have reasonably anticipated being haled into court here. Indeed, Telkom reasonably expected the opposite-not to be haled into court here-because the parties expressly consented to the jurisdiction of the South African courts and agreed that South African law would govern their agreement, and because the contract activities were centered in South Africa."

In the Matter of the Arbitration of Certain Controversies Between Telcordia Technologies, Inc. and Telkom SA, Limited, Civ. A. No. 02-1990, at *7 (D.D.C. July 22, 2003). The D.C. district court held that Telkom's contacts with the United States, including New Jersey, were insufficient to subject Telkom to personal jurisdiction in the U.S. The jurisdictional analysis undertaken by the D.C. district court is based on the very same contacts and is instructive here, though Telcordia has added, in this court, a declaration to the effect that it performed software testing in New Jersey and that representatives of Telkom visited New Jersey to participate in testing-related matters, DeCort Decl. ¶¶ 4-5. Nonetheless, the facts of the personal jurisdiction analysis are virtually identical.

The parties agree that the D.C. district court's personal jurisdiction findings are not preclusive because on review the D.C. Circuit did not reach the issue of personal jurisdiction. However, the D.C. district court clearly considered it and ruled that there was no basis for exercising jurisdiction. The court concluded that four "incidental" visits to the United States, when evaluated in the context of the parties' entire relationship, did not amount to purposeful availment. Additional visits, Telkom argues, pertain to an unrelated contract and are irrelevant to specific jurisdiction in this instance.

This Court agrees with the findings of the D.C. district court, and is persuaded that this contract and the parties' performance thereof are tied to South Africa in virtually all respects. The Court agrees with the D.C. district court's finding that these isolated visits to New Jersey were merely incidental to the performance of the contract and, in any event, were not occasioned by Telkom's purposeful availment of the privilege of conducting activities in the United States. As to payment arrangements, wire or mail transfers of money directed at the forum are insufficient to confer jurisdiction. *See, e.g., Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1031 (5th Cir. 1983); *Asset Allocation and Mgmt. Co. v. Western Employers Ins. Co.*, 892 F.2d 566, 569-70 (7th Cir. 1989); *T.J. Raney & Sons, Inc. v. Security Says. & Loan Ass'n*, 749 F.2d 523, 525 (8th Cir. 1984). In short, the Court finds insufficient contacts with this forum to justify the assertion of personal jurisdiction over Telkom.

Next to be addressed is Telcordia's assertion that Telkom has sufficient nationwide contacts to support the exercise of jurisdiction under Federal Rule of Civil Procedure 4(k)(2). The argument as to nationwide jurisdiction goes that, as an international telecommunications company, Telkom routinely does business with U.S. citizens and companies, and benefits from its relationship with the U.S. and several U.S. entities. (Russell Decl., Exs. 2-18). In addition, Telkom management visits the U.S. periodically for business purposes, including conferences in California and New York City. Telkom has also reportedly entered into a partnership with SBC, a Texas corporation, through which key executives were apparently transferred from SBC to Telkom; launched an initial public offering in March 2003; entered into a Deposit Agreement with the Bank of New York to sell securities in the U.S. and opened a U.S. account to do so; opened an office in Connecticut to "establish a point of presence in the USA to service [Telkom] customers; uses U.S. facilities to route

internet traffic under licensing agreements with U.S. companies; and sent representatives to the U.S. in connection with a separate contract between Telkom and Telcordia. (Rollins Decl. ¶¶ 5, 11; D.C. Cir. Br. at 21-18 (summarizing contracts)).

Telkom responds that, and the D.C. district court found, the IPO and relationship with SBC do not make out "continuous and systematic" contacts with the U.S. given that that standard looks to activities central to the defendant's ordinary business operations. The D.C. district court further found that Telkom's IPO and stock exchange listing do not confer jurisdiction, noting that the case law allows for substantial latitude in foreign entities listing securities on the stock exchanges and prepatory activity in that regard without the risk of subjecting themselves to New York jurisdiction. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 97 (2d Cir. 2000). Likewise, SBC's interest in Telkom and their agreement do not appear to be jurisdictionally significant in that they do not support a continuous and systematic manner of doing business in the United States. As to its business relationship with several U.S. entities, Telkom points out that its sworn declarations attest to the fact that it is not conducting any business in the U.S., Mandla Decl. ¶ 6, and that, not inconsistent with the public information on which Telcordia relies, it merely uses goods and services provided by US-based companies. Thus, these facts do not support the notion that Telkom engages in "continuous and systematic" business in the United States.

Nor does the exercise of personal jurisdiction over Telkom comport with notions of "fair play and substantial justice." The Court agrees with Telkom that it should accord weight to the fact that the parties anchored their contractual relationship to South Africa, expressly consented to the jurisdiction of the South African courts, and agreed that South African law would govern their

agreement. Asserting personal jurisdiction over Telkom would run contrary to the parties' expectations in those respects.

As to Telcordia's request for jurisdictional discovery, the Court is mindful that a plaintiff need not make a substantial showing to obtain jurisdictional discovery. On the other hand, a plaintiff must make a threshold showing of factual allegations that suggest "with reasonable particularity" the existence of contacts sufficient to assert personal jurisdiction. *Toys "R" Us, Inc.*, 318 F.3d at 456 (quoting *Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992)). The Third Circuit has instructed that "courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claims are 'clearly frivolous.'" Id. (*quoting Mass. School of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026, 1042 (3d Cir. 1997)).

But this Court has dismissed the Petition to confirm the partial arbitral award on two alternate bases detailed in the record (and set forth in an Order dated January 24, 2005), in addition to jurisdictional grounds. Accordingly, this case is no longer pending before this Court (or any other United States court) and, under present circumstances, jurisdictional discovery would accomplish nothing and therefore is not warranted or appropriate.

CONCLUSION

This Court concludes that personal jurisdiction may not be asserted over Telkom. The Petition to Confirm the Arbitration Award will be dismissed for lack of personal jurisdiction, as well as for the reasons already set forth on the record, and Telcordia's request for jurisdictional discovery will be denied.

Accordingly, IT IS on this 15th day of February 2005,

ORDERED that the Petition of Telcordia Technologies, Inc. to dismiss the Petition to Confirm the Partial Arbitral Award and Compel Further Arbitration is dismissed for lack of personal jurisdiction over Respondent Telkom SA, Limited; and it is further

ORDERED that the request of Telcordia Technologies, Inc. for jurisdictional discovery is denied.

/s/ John C. Lifland, U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-1990 (JR)

In the matter of the Arbitration of Certain Controversies Between TELCORDIA TECHNOLOGIES, INC., PETITIONER

and

TELKOM SA, LIMITED, RESPONDENT.

[Filed: July 22, 2003]

MEMORANDUM

Telcordia Technologies, Inc. ("Telcordia"), seeks enforcement of a partial award rendered in arbitration in South Africa of its commercial dispute with Telkom SA, Limited ("Telkom"), a South African company. Telkom moves to dismiss for lack of personal jurisdiction and on *forum non conveniens* grounds. For the reasons stated below, Telkom's motion will be granted.

Background

Telcordia is a technology services company based in New Jersey. Pet. at ¶ 5. Telkom is a corporation organized under the laws of South Africa with its principal place of business in South Africa. Ngcobo Decl. at ¶ 3. The dispute between Telcordia and Telkom

involves an agreement for Telkom to provide and Telcordia to purchase telecommunications software. The South African government owned sixty-seven percent of Telkom's stock shares at the time Telkom entered into the contract with Telcordia. *Id.* at ¶ 4. The contract ("Integrated Agreement") was negotiated in South Africa and was executed there on June 24, 1999. *Id.* at ¶ 9; Castelli Decl. at ¶ 3. It provided that disputes would be submitted to arbitration in South Africa, under the jurisdiction of the South African courts, and that the contract terms were to be interpreted under the laws of South Africa. Integrated Agreement, Ex. A at ¶ 19.1. Telcordia was required to set up a local office in South Africa to perform its responsibilities under the contract, and delivery of the software products was to be made in South Africa. Integrated Agreement at ¶ 10. Telkom was to wire payments due under the contract to Telcordia's bank account in the United States. Integrated Agreement, Ex. B at ¶ 10.3. Telcordia asserts that "much of the work" was performed at its offices in the United States, Castelli Decl. at ¶ 4.[2] During the performance of the contract, Telkom's technical staff visited Telcordia's offices in the United States to learn more about the product that Telcordia was designing for Telkom. Castelli Decl. at ¶ 5; Ngcobo Decl. at ¶ 9.

In early 2001, after disputes arose about Telcordia's performance, both parties exercised their rights to cancel the Integrated Agreement, each claiming a breach by the other. The dispute went to arbitration before the International Chamber of Commerce. A single arbitrator (an English barrister) was appointed. Pursuant to the Integrated Agreement, the arbitration took place in South Africa. In August 2002, while the arbitration was in process, Telkom believed that the arbitrator was

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[2] This is disputed. Ngcobo Decl. at ¶ 10.

applying English contract law rather than South African law and thus, "referred a question" to the High Court of South Africa under Section 20 of the South African Arbitration Act of 1965, which allows such a submission to the High Court during the pendency of arbitration. Telkom also requested a stay of arbitration proceedings until the Section 20 question was resolved by the High Court, but the arbitrator declined that request and, on September 27, 2002, released a partial arbitral award in favor of Telcordia. The partial arbitral award did not assess damages. On November 5, 2002, Telkom petitioned the High Court to set aside the partial arbitral award, asserting that the arbitrator had violated Section 20 and objecting that the partial award had been entered before it had the chance to submit evidence and argument on certain issues. That petition to set aside the partial arbitral award is still pending before the High Court in South Africa. Nonetheless, in this court, Telcordia seeks enforcement of the partial arbitral award.

Analysis

I. Personal jurisdiction

Telkom does not dispute that it is an "agency or instrumentality of a foreign state," as defined by the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1603(b), and that subject matter jurisdiction is proper under the arbitral exception to the FSIA, 28 U.S.C. § 1605(a)(6), but Telkom asserts that the exercise of personal jurisdiction in this case offends the Due Process Clause of the Fifth Amendment because of the insufficiency of minimum contacts with the forum. Telcordia, for its part, insists that the "minimum contacts" analysis is irrelevant, because the Due Process Clause does not apply to foreign instrumentalities, and it asserts that, once subject matter jurisdiction over a claim against a foreign instrumentality has been established under one of the exceptions of the FSIA, personal jurisdiction is automatic. Telcordia also argues that, even

if the "minimum contacts" test applies, Telkom has enough minimum contacts with the United States to justify personal jurisdiction over the foreign respondent.

Subject matter jurisdiction under the FSIA and personal jurisdiction under the Due Process Clause of the Constitution are two distinct inquiries. As the Court of Appeals explained in *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982):

> [S]tatutorily, personal jurisdiction exists so long as subject matter jurisdiction exists and service has been properly made under section 1608 of FSIA . . . . However, a statute cannot grant personal jurisdiction where the Constitution forbids it, and the Supreme Court has held repeatedly that certain "minimum contacts" must exist between the person and the jurisdiction to be consistent with the Due Process Clause of the Fifth Amendment.

Id. at 1028. Thus, the court "must undertake a bifurcated analysis, asking first whether a United States court has subject matter jurisdiction, and second whether it can exercise personal jurisdiction over the defendants." *Id.* at 1026. In Telcordia's submission, *Gilson* is no longer good law, because of *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), which held that foreign states cannot invoke the minimum contacts test to contest personal jurisdiction. *Price*, however, was limited to cases involving an "actual foreign government," *id.* at 99; the Court of Appeals expressly declined to decide whether other entities that fall within the FSIA's definition of 'foreign state' -- including corporations -- can be considered persons under the Due Process Clause. *Id.* at 100 (internal citation omitted). Telcordia's argument for extending the holding of *Price* to remove due process protection for any foreign corporation in which a foreign state owns a majority interest is

rejected. The proposition is unsupported by persuasive authority and runs afoul of the well-established precedent that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655, 1660 (2003)(quoting *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983)).

Due process requires that the defendant "have [had] certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 127 (D.C. Cir. 1999)(citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). There must be some purposeful availment of the privilege of conducting activities within the forum state, and the contacts "must be of a quality that [the defendant] 'should reasonably anticipate being haled into court' in the forum." *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). When the claims against a defendant arise from its activities within the forum state, maintenance of the action within the forum state generally does not offend "traditional notions of fair play and substantial justice," because in those circumstances, the defendant ordinarily should reasonably anticipate being haled into court there. *World-Wide Volkswagen*, 444 U.S. at 297. Conversely, when the claims are unrelated to the defendant's activities in the forum, jurisdiction is likely to be improper. *See id.* at 297-98. Regardless of whether Telcordia is asserting specific or general jurisdiction, Telkom's contacts with the forum are insufficient to exercise personal jurisdiction in this case. Telcordia's claims do not arise out of Telkom's actions in the United States, and there are no acts by Telkom of purposeful

availment of the privileges of conducting business in the United States, or acts pursuant to which Telkom should have reasonably anticipated being haled into court here.[3] Indeed, Telkom reasonably expected the opposite -- not to be haled into court here -- because the parties expressly consented to the jurisdiction of the South African courts and agreed that South African law would govern their agreement, and because the contract activities were centered in South Africa.

Except for the fact that payment was to be made by wiring funds to an account in Telcordia's bank in the United States, this case is analogous to *Creighton*, in which the Court of Appeals found that Qatar lacked minimum contacts with the United States notwithstanding Qatar's contract with a U.S.-based company, because the contract was offered, accepted, performed, and allegedly breached in Qatar. *Creighton*, 181 F.3d at 128. Telcordia's contract with Telkom was negotiated, executed, and performed in South Africa, and was subject to the laws of that country. Telkom did not solicit Telcordia's business or secure its services in the United States. Instead, Telcordia won the contract by outbidding other companies. Telkom's assertion that "much of its work" on the contract took place in the United States is not quantified, Castelli Decl. ¶ 4, and that mere assertion does not trump the Integrated Agreement's provision that the place of performance was South Africa. Telcordia agreed to "creat[e] a branch office of Telcordia Technologies, Inc. in the Republic of South Africa in order to perform Telcordia's responsibilities and obligations under this Integrated Agreement," Integrated Agreement at 8, § 10, and Telkom explains that this

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[3] Telkom does not argue that due process requires that it have contacts with the forum state as opposed to the United States in general.

branch office requirement was not merely a formality. The office was a key location for Telcordia employees to perform the work required by the contract. *See* 6/25/03 Tr. at 3. Telcordia did not dispute that proposition in its briefs or in oral argument. The facts of record do not add up to the minimum contacts that would be necessary for personal jurisdiction.

Telkom's four visits to the United States between April and September 2000, Castelli Decl. at ¶ 5, do not amount to purposeful availment. *See Creighton*, 181 F.3d at 128 (recognizing distinction between purposeful availment and contacts that are incidental to the fact that the party providing Case 1:02-cv-01990-JR Document 18 Filed 07/22/2003 Page 8 of 12 (40a) - 9 - the services under the contract happens to be located in the United States). Nor does Telkom's obligation to wire funds to Telcordia's bank account in the United States give rise to personal jurisdiction here: the dispute was not about payments in America but about performance in South Africa. *See, e.g., Federated Rural Elec. Ins. Corp. v. Inland Power & Light Co.*, 18 F.3d 389, 395 (7th Cir. 1994); *Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1147 (5th Cir. 1985). *Cf. Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 134 (2d Cir. 1998)(plaintiff's breach of contract claim arose from defendant's issuance of a letter of credit consenting to make payment wherever plaintiff specified, and thus, defendant's obligation to wire funds to plaintiff's account in New York satisfied minimum contacts test). To exercise jurisdiction based on Telkom's payments to Telcordia's bank account in the United States and on a few visits to the United States that were incidental to the fact that Telcordia is located here would not comport with "traditional notions of fair play and substantial justice," *Int'l Shoe Co.*, 326 U.S. at 316.

Telkom has other contacts here that were unrelated to the contractual dispute. It listed an initial public offering on the New York Stock exchange; it

retained management services from a San-Francisco company; and it contracted briefly with a company in Westport, Connecticut (resulting in a credit report erroneously suggesting the existence of a Telkom office in Connecticut, *see* 6/25/03 Tr. at 10-11). Those contacts unrelated to the dispute between Telcordia and Telkom were not and are not the "systematic and continuous" contacts that are necessary for general personal jurisdiction. *See Helicopteros Nacionalies de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-18 (1984)(one-time visit to the forum for contract negotiations or personnel training deemed insufficient for general personal jurisdiction); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 97 (2d Cir. 2000)(absent other substantial contacts, a company is not "doing business" in the forum merely by taking ancillary steps in support of its listing on a New York stock exchange); *Recycling Sciences Int'l, Inc. v. Soil Restoration & Recycling, L.L.C.*, 159 F. Supp. 2d 1095, 1102 (N.D. Ill. 2001)(no personal jurisdiction based on one-time sale in the forum unrelated to the cause of action). And if those contacts could somehow be construed as substantial, the exercise of general jurisdiction in a case such as this -- where the parties expressly agreed to be subject to the jurisdiction of another forum and their course of dealing was primarily in that other forum -- would be inconsistent with traditional notions of fair play and substantial justice.

II. *Forum non conveniens*

Telkom's motion to dismiss is also granted on the alternative ground of *forum non conveniens*. Telcordia has not questioned the ability of South African courts to provide an alternative forum to resolve the parties' dispute. In fact, the South African High Court is currently reviewing Telkom's petition to set aside the partial arbitral award that Telcordia seeks to enforce. South Africa is a signatory to the New York Convention, making it possible for Telcordia to seek enforcement of the

arbitral award in South Africa. Telcordia argues that it was foreseeable that it would seek enforcement of the arbitral award in the United States, merely because it is an American company and Telkom agreed to arbitration, but that argument -- which essentially means that Telcordia agreed to South African law and South African courts with its fingers crossed -- is rejected on policy grounds.

Applying the traditional balancing test, it appears that the private interest factors -- relative ease of access to sources of proof, availability of witnesses, and the costs of obtaining witnesses[4] -- are in equipoise, because both parties claim that it is more convenient to litigate in their respective countries. The public interest factors,[5] however, strongly favor South Africa as the forum. The contract was for services to be provided to a company in South Africa for the benefit of South African consumers. The laws of South Africa that govern the contract would be best enforced by the courts of that country. All of these considerations outweigh Telcordia's private interest in seeking enforcement of its arbitral award in the United States.

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[4] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

[5] *Id.* (public factors include the local interest in resolving local disputes and the problems implicated in the application of foreign law).

Conclusion

For the foregoing reasons, Telcordia's petition to enforce the partial arbitral award will be dismissed. An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 02-1990 (JR)

In the matter of the Arbitration of Certain Controversies
Between TELCORDIA TECHNOLOGIES, INC.,
PETITIONER

and

TELKOM SA, LIMITED,
RESPONDENT.

[Filed: July 22, 2003]

ORDER

For the reasons set forth in the accompanying memorandum, the respondent's motion to dismiss (#11) is **granted.**

SO ORDERED this 20th day of July 2003.

JAMES ROBERTSON
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-7099

TELCORDIA TECHNOLOGIES, INC.,
IN THE MATTER OF THE ARBITRATION OF CERTAIN CONTROVERSIES BETWEEN,
APPELLANT

v.

TELKOM, SA, LIMITED,
APPELLEE

[Filed: April 9, 2004]

Before: RANDOLPH, ROGERS, and GARLAND, Circuit Judges.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and the briefs and oral arguments of the parties. After full review of the case, the court is satisfied that appropriate disposition of the appeal does not warrant an opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(b). It is

ORDERED and **ADJUDGED** that the district court's judgment is affirmed. Telcordia appeals the district court's granting of Telkom's motion to dismiss. The court dismissed Telcordia's petition to enforce the

partial arbitral award against Telkom based on *forum non conveniens* and lack of personal jurisdiction. We will presume the district court's dismissal was without prejudice because the district court did not state otherwise. *See Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1090-91 (D.C. Cir. 1998).

Telcordia asserts that the district court erred by dismissing the case on *forum non conveniens* because this ground is not specified in Articles V or VI of the "New York Convention." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 53, as implemented by and reprinted in the Federal Arbitration Act, 9 U.S.C. §§ 201-208. Application of *forum non conveniens*, Telcordia argues, also runs counter to the purposes of the New York Convention, which is to allow for the recognition and enforcement of arbitral awards outside of the arbitral forum, here South Africa. New York Convention art. I.

We need not concern ourselves with the application of *forum non conveniens* in this context, nor must we address personal jurisdiction. Article VI of the New York Convention allows a district court to "adjourn" a decision on the enforcement of the arbitral award if "an application for the setting aside or suspension of the award has been made to a competent authority . . .." Telkom made such an application to the High Court of South Africa. (On November 27, 2003, after Telcordia filed this appeal, the High Court issued a decision setting aside the partial award, which Telcordia says it intends to appeal.) Telkom argued in considerable detail to the district court that it should adjourn proceedings under Article VI pending the outcome of Telkom's petition before the High Court. *See* Resp. Telkom's Mot. To Dismiss the Pet., or in the Alternative, to Stay Proceedings at 17-24.

We may affirm a judgment on any ground that is properly raised below, even if the district court did not rely on it. *See Tymshare Inc. v. Covell*, 727 F.2d 1145, 1150 (D.C. Cir. 1984); *LFC Lessors, Inc. v. Pacific Sewer Maint. Corp.*, 739 F.2d 4, 7 (1st Cir. 1984); 5 AM. JUR. 2d *Appellate Review* §§ 828-829 (2003). Because Telkom raised the issue below, and because we construe "adjourn" to mean stay or dismiss without prejudice, we affirm the district court on the ground that the court's dismissal was proper under Article VI of the New York Convention.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after the disposition of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

APPENDIX G

Sections 201 through 208 of Title 9 of the United States Code provide as follows:

Sec. 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

Sec. 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Sec. 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or

proceeding, regardless of the amount in controversy.

Sec. 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Sec. 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Sec. 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that

place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Sec. 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Sec. 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

APPENDIX H

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Done at New York, on 10 June 1958

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition

and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and

may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 [2] and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [3] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the

ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Notes:

[1] In accordance with Article XII, the Convention came into force on 7 June 1959, the ninetieth day following the date of deposit with the Secretary-General of the United Nations of the third instrument of ratification or accession. The following States have deposited their instruments of ratification or accession (a) on the dates indicated:

Israel . . . . . 5 January 1959
Morocco . . . . . 12 February 1959(a)
United Arab Republic . . . . . 9 March 1959 (a)

[2] League of Nations, *Treaty Series*, Vol. XXVII, p. 157; Vol. XXXI, p. 260; Vol. XXXV, p. 314; Vol. XXXIX, p. 190; Vol. XLV, p. 116; Vol. L, p. 161; Vol. LIX, p. 355; Vol. LXIX, p. 79; Vol. LXXII, p. 452; Vol. LXXXIII, p. 393; Vol. LXXXVIII, p. 312; Vol. XCVI, p. 190; Vol. C, p. 211; Vol. CIV, p. 499; Vol. CVII, p. 470; Vol. CXI, p. 403; Vol. CXVII, p. 55; Vol. CLVI, p. 185; Vol. CLXXXI, p. 356; Vol. CLXXXV, p. 372; Vol. CXCIII, p. 268, and Vol. CC, p. 500; and United Nations, *Treaty Series*, Vol. 117, p. 394; Vol. 261, p. 422, and Vol. 325

[3] League of Nations, *Treaty Series*, Vol. XCII, p. 301; Vol. XCVI, p. 205; Vol. C, p. 259; Vol. CIV, p. 526; Vol. CVII, p. 528; Vol. CXI, p. 414; Vol. CXVII, p. 303; Vol. CXXX, p. 457; Vol. CLVI, p. 210; Vol. CLXXXI, p. 389; Vol. CLXXXV, p. 391, and Vol. CXCIII, p. 269; and United Nations, *Treaty Series*, Vol. 122, p. 346; Vol. 134, p. 402; Vol. 269, p. 384, and Vol. 325